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Supreme Court of the United States

OCTOBER TERM 1956

No. 356

BAY STATE CAFE INC.
AND
BRIGHAMS CAFE INC.,
Petitioners,

v.

LOUIS R. COHEN,
Respondent.

BRIEF OF RESPONDENT, LOUIS R. COHEN, IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

LOUIS R. COHEN
The Respondent Pro Se
1138 Boyston Street
Boston, Massachusetts

Blanchard Printing Company, Boston, Mass. — Law Printers

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Statement of the Case

During the course of a hearing on a bill in equity brought by the Petitioner, Bay State Cafe, Inc., which was holding certain premises in Boston as assignee of a lease, to prevent the defendant owner from evicting it, the parties agreed in a writing dated April 17, 1954, to settle their controversy, and two instruments in the form of final decrees

and bearing the assent of all parties in interest and waiving all right of appeal were left with counsel for the defendant; one favorable to the Petitioner, Bay State Cafe, Inc., and requiring reinstatement of the lease was to be entered if certain things according to the written agreement of April 17, 1954, were performed by the Petitioner, Bay State Cafe, Inc. by July 2, 1954, otherwise the decree terminating the lease and dismissing the bill was to be entered. Counsel for the defendant caused the latter decree to be entered on July 7, 1954. The Petitioner, Bay State Cafe, Inc., on July 9, 1954, filed a motion to vacate this decree and after a denial of this motion it filed a second motion on October 29, 1954, to vacate the decree of July 7, 1954. The Petitioner, Bay State Cafe, Inc. had appealed to the Supreme Judicial Court from a decree denying its motion of July 9, 1954. It has also excepted and appealed from the denial of its motion of October 29, 1954. No exceptions were perfected.

The Supreme Judicial Court of the Commonwealth of Massachusetts upon review by it of the entire record found "there was no error in the denial of the motions and the decision of the Court must be affirmed" (Petition Page 22).

The Final Decree of the Superior Court of the Commonwealth of Massachusetts entered on July 7, 1954, (Record pages 10 and 11) was entered in a case in which the Petitioner, Brigham's Cafe, Inc., named in this petition, was not a party (see original Bill of Complaint Record, page 1).

Argument

The entire record of the evidence submitted to this Court, is the evidence taken by the Superior Court of the Commonwealth of Massachusetts on the hearings of two motions filed by Bay State Cafe, Inc. to vacate the Final Decree of July 7, 1954 (see Record pages 12, 36, 113 and 117).

The denial of a motion to vacate a Final Decree is not a final judgment nor a final decree.

The allowance of a motion to vacate a Final Decree is a matter of discretion for the courts, and is not appealable if disallowed.

The power to reopen a case after Final Decree is an extraordinary one, "Its exercise, vacating the final decree and giving the case a new lease of life, is appealable as an interlocutory decree. It does not follow that the refusal to exercise it, is likewise appealable. An appeal is a creature of statute, not a constitutional or inherent right. . . . An appeal in equity under our statutes may be taken only from an interlocutory decree or a final decree. . . . Not every judicial act in an equity case falls within either class . . . a refusal to exercise the extraordinary power to reopen a case after final decree . . . is neither an interlocutory decree nor a final decree. Consequently it is not appealable. . . . A party has no enforceable right to have that extraordinary power exercised, and no remedy if not exercised."

> *Carrilli* v. *Hersey*, 303 Mass. 82 at 86, 87, General Laws of Massachusetts. (Ter. Ed.) Chapter 214, Section 19. (See Petition, page 16.)

The Supreme Judicial Court of Massachusetts reaffirmed the foregoing in the instant case by stating in its opinion:

> "We assume in favor of the Plaintiff, without deciding, that these appeals are properly here, see *Carrilli* v. *Hersey*, 303 Mass. 82, 86, 87, because in any event the ultimate decision must be against the Plaintiff".

(See Petition, page 21.)

The record discloses an orderly process, with the Petitioner, Bay State Cafe, Inc., being given on every occasion

an opportunity to convince the trial court of its contentions, not once, but twice, not on mere affidavits as such motions are more often heard, but it was afforded a full hearing with witnesses under oath, examined and cross-examined, and exhibits introduced. Pending the hearing on the first of the Petitioner's, Bay State Cafe, Inc., motions, the Court by appropriate orders enjoined the defendant from enforcing the FINAL DECREE, and preserved the Petitioner's, Bay State Cafe, Inc., rights, nothing could have been more fair and equitable to the Petitioner, Bay State Cafe, Inc. (Record, pages 19 and 20.)

In suits in equity in the Supreme Judicial Court of the Commonwealth of Massachusetts and in its Superior Court, there is a remedy by Bill of Exceptions for a refusal or failure by the Trial Judge to comply with a statutory request for a report of material facts.

Vergnani v. *Vergnani*, 321 Mass. 699 at page 701.

The Petitioner, herein Bay State Cafe, Inc., failed to follow this well-established rule, and cannot raise this question on a petition for a Writ of Certiorari.

A perusal of the record shows that no Federal question was raised.

The Petitioner's reference to a group of cases on pages 8 and 9 of its petition under paragraphs 2A and 2B have no connection with the instant petition as neither the Petitioner, Bay State Cafe, Inc., nor the Respondent were parties to any of the cases referred to therein, and as to the case referred to on page 9, under paragraph C of the petition, Martin-Edwards, Inc. is not a party to the suit in which Certiorari is being sought.

The Petitioner's complaint, that it was denied an opportunity to introduce evidence to preserve its rights, is refuted by the 147 page record filed with this Court. The

Superior Court of the Commonwealth of Massachusetts could have vacated the decree if the Petitioner herein, Bay State Cafe, Inc., had convinced the Trial Court of the merits of its contentions on the facts. The record indicates that the Petitioner, Bay State Cafe, Inc., was afforded ample protection of its rights through regular and familiar equity practice.

It is submitted that there is no basis on the record to grant the issuance of a Writ of Certiorari.

Respectfully submitted,

Louis R. Cohen
The Respondent pro se